U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA DABNEY and INTERNAL REVENUE SERVICE, WEST 44TH STREET OFFICE, New York, N.Y.

Docket No. 97-903; Submitted on the Record;
Issued December 2, 1998

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained a left knee, low back and left elbow injury in the performance of duty on June 12, 1995; and (2) whether the Office of Workers' Compensation Programs abused its discretion under section 8128(a) of the Federal Employees' Compensation Act by denying appellant's July 7, 1996 request for a merit review.

On June 15, 1995 appellant, then a 44-year-old revenue officer, filed a claim for left knee, lumbar and left elbow injuries sustained on June 12, 1995 at 4:15 p.m. when she slipped and fell on a wet subway ramp while on her way home. Appellant stated that "[a]fter leaving [her] office around 4:15 p.m. it was raining and [she] was on [her] way home. [She] took the R train to 34th Street," and switched at that station to take the D train uptown. As appellant was switching trains, she "had to walk down a ramp and then slipped on the wet ramp pavement and fell, injuring [her] left knee … back and arms." On the reverse of the form, Ms. Lindell James, appellant's supervisor, noted that appellant's regular work hours were from 7:00 a.m. to 3:30 p.m. Monday through Friday, and her regular duty station was at 110 West 44th Street.

Michael M. Kinderman, an employing establishment benefits specialist, completed an authorization for medical treatment (Form CA-16) on June 15, 1995. Mr. Kinderman related appellant's account that on June 12, 1995, "after she left her taxpayer at 4:15 p.m. she was in the subway on the way home, and as she was switching trains she was going down a ramp and then slipped on the wet ramp pavement (since it had been raining) and fell, injuring her left leg, back

and arms."[1] The record indicates that appellant stopped work on June 12, 1995 returned to work on July 11, 1995 and stopped work again on September 15, 1995 and did not return.

On March 12, 1996 appellant filed a claim for a recurrence of disability beginning September 15, 1995. Appellant stated that she did not recover fully from the June 12, 1995 injuries when she returned to work, and had been under medical treatment since stopping work on September 15, 1995 for chest pain, depression, hypertension, and shoulder problems. Ms. James noted that appellant stopped work on September 15, 1995 and had not returned.

In an April 30, 1996 form, Ms. James stated she was unable to specify between what points appellant was traveling at the time of the June 12, 1995 accident, but that appellant "was working on the compliance 2000 detail with Mr. Martin Tarnoff" at the time contacting taxpayers. Ms. James noted that according to her records, "there was no credit time posted for June 12, 1995 or any other days while [appellant] was on the detail. There does not appear to be any additional time worked beyond her normal tour-of-duty hour."

In a May 3, 1996 form, appellant stated that she slipped and fell while changing subway trains at 34th Street and 6th Avenue at approximately 4:15 p.m. on June 12, 1995, and was next expected to report for duty at 8:00 a.m. on June 13, 1995 at the West 44th Street office, her normal duty station.

By decision dated June 20, 1996, the Office denied appellant's claim on the grounds that the June 12, 1995 injuries did not occur in the performance of duty. The Office found that appellant was on her way home when she slipped and fell at 4:15 p.m. on June 12, 1995. The Office further found that the employing establishment stated that there was no credit time posted for appellant on June 12, 1995 while she was on detail, with no indication of additional time worked beyond her normal tour-of-duty hours that day. The Office therefore found that appellant's injuries were not sustained within the performance of duty, and the slip and fall was an ordinary, nonoccupational hazard shared equally by all travelers.

Appellant disagreed with this decision, and in a July 7, 1996 letter requested reconsideration. Appellant alleged that she was on detail on June 12, 1995, and although her tour of duty was 7:00 a.m. to 3:30 p.m., her supervisor advised her to fill out a claim form and see an injury compensation specialist. She stated that due to the nature of her duties, there were "many days that [she] was delayed with the taxpayer later than [her] regular tour of duty."

By decision dated October 7, 1996, the Office denied appellant's request for a merit review on the grounds that her July 7, 1996 letter, the only evidence submitted in support of her request, was of an "immaterial" nature. The Office found that the employing establishment contradicted appellant's allegations of working longer hours than her 7:00 a.m. to 3:30 p.m. tour of duty, and that there was no indication that appellant worked beyond her normal tour-of-duty hours on June 12, 1995. The Office noted that appellant's supervisor's advice that appellant file

[1] In a June 15, 1995 report, Dr. Avram Nemetz, an employing establishment contract physician, noted a history of June 12, 1995 injury, diagnosed a left knee derangement, back strain and elbow contusion, and advised that appellant remain off work pending completion of an orthopedic evaluation. In June 19 and 26, 1995 reports, Dr. Anthony C. Milea, an attending orthopedist, diagnosed a left patella contusion, lumbosacral strain and left shoulder bursitis, and prescribed physical therapy.

a compensation claim did not, in itself, establish that the claimed June 12, 1995 injuries were sustained in the performance of duty.

The Board finds that appellant has not established that she sustained injuries in the performance of duty on June 12, 1995.

The Act provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained "while in the performance of duty."[2] It is not an insurance program against each and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with her employment.[3] The Board has interpreted the phrase "while in the performance of duty'' as "arising out of and in the course of employment."[4] The Board has stated generally that to occur in the course of employment, an injury must occur: "(1) at a time when the employee may reasonably be said to be engaged in her master's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto."[5]

The Board has recognized, as a general rule, that off-premises injuries sustained by employees having fixed hours and places of work, while going to or coming from work, are not compensable as they do not arise out of and in the course of employment. Such injuries are merely the ordinary, nonemployment hazards of the journey itself which are shared by all travelers.[6] For example, in *Robert A. Hoban*,[7] the employee sustained an injury when he fell on an icy street while walking to work and fractured his left wrist. The Board found that nothing in the facts of the case brought the claim within any of the recognized exceptions to the general going to and coming from rule and affirmed the denial of the claim.[8]

In the present case, the Office found that appellant's injury occurred off the premises of the employing establishment while in a public subway station, and therefore did not occur in the

[2] U.S.C. §§ 8101-8193

[3] *Bruce A. Henderson*, 39 ECAB 692 (1988); *Minnie M. Huebner*, 2 ECAB 20 (1948).

[4] *Bernard D. Blum*, 1 ECAB 1, 2 (1947).

[5] *Melvin Silver*, 45 ECAB 677 (1994).

[6] *Thomas P. White*, 37 ECAB 728 (1986); *Robert F. Hart*, 36 ECAB 186 (1984); *Estelle M. Kasprzak*, 27 ECAB 339 (1976).

[7] *Robert A. Hoban*, 6 ECAB 773 (1954) citing *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 479.

[8] *See, e.g.*, V*irginia Bernice Mitchell*, 32 ECAB 1437 (1981) (a noncompensable injury sustained when the employee was assaulted while on her way to work); *Anne R. Rebeck*, 32 ECAB 315 (1980) (a noncompensable injury when the employee tripped over a cobblestone sidewalk adjacent to the employing establishment premises); *Gloria C. Adalian*, 26 ECAB 131 (1974) (a noncompensable fall on a sidewalk immediately adjacent to the federal building in which the employee worked); *Harriett Williams (Harrison O. Williams)*, 20 ECAB 327 (1969) (the death of the employee due to an automobile accident while driving to work found noncompensable); *Esther S. Freeman*, 12 ECAB 39 (1961) (a noncompensable injury on a public thoroughfare while on the way to work); *Rowena R. Davis*, 8 ECAB 226 (1955) (a noncompensable injury sustained while stepping down from a street car while en route to work); *Isidor S. Handelsman*, 7 ECAB 99 (1954) (a noncompensable injury sustained while crossing a street while on the way to work).

performance of duty. The evidence of record, including appellant's own statement on her June 15, 1995 claim form clearly establishes that, at the time of injury, appellant had fixed hours of work, from 7:00 a.m. to 3:30 p.m., and that her injury occurred during her afternoon commute home from work at 4:15 p.m. in a subway station. Appellant's supervisor stated that appellant posted no credit time for June 12, 1995 or any other days of the employment detail, and did not work any additional time worked beyond her normal tour of duty which ended at 3:30 p.m. Thus, as appellant was not on the actual or constructive premises of the employer, or engaged in activities incidental to her employment, she cannot be considered within the protection of the Act.[9] As appellant has not established that she sustained an injury in the performance of duty, the medical record need not be addressed.

Regarding the second issue, the Board finds that the Office did not abuse its discretion by denying appellant's July 7, 1996 request for a merit review.

To require the Office to open a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of the claim by written request to the Office identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

"(i) Showing that the Office erroneously applied or interpreted a point of law, or

"(ii) Advancing a point of law or fact not previously considered by the Office, or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[10]

Section 10.328(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[11]

Appellant submitted no evidence in support of her request for a merit review other than the July 7, 1996 letter itself, alleging that her supervisor's advice to fill out a claim form should bring the June 12, 1995 accident within the performance of duty, and alternatively that the employing establishment knew she was in the performance of duty at the time she fell as she had been delayed on other days. These allegations are without merit and are entirely unsubstantiated by the record. Therefore, the letter does not constitute relevant and pertinent evidence not considered by the Office. Additionally, appellant's July 7, 1996 letter does not show that the Office erroneously applied or interpreted a point of law, or advance a point of law or fact not

[9] *See Edith F. Bolet*, 6 ECAB 245 (1953). The Board finds that there is no evidence of record that appellant's commute home fell under one of the exceptions to the going to or coming from work rule. Appellant did not establish that the subway ride home was a requirement of her employer, that the employing establishment contracted for or paid for her transportation home, that she was subject to emergency calls while at home, or that the trip was used to do something incidental to her employment with the employing establishment's knowledge and approval.

[10] 20 C.F.R. § 10.138(b)(1).

[11] 20 C.F.R. § 10.138(b)(2).

previously considered by the Office. The Board finds that the Office properly exercised its discretion in conducting a limited review of the letter, and afterward properly denied appellant's July 7, 1996 request for a merit review.

The decisions of the Office of Workers' Compensation Programs dated October 7 and June 20, 1996 are hereby affirmed.

Dated, Washington, D.C.
December 2, 1998

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member